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In The

Supreme Court of the United States

October Term, 1962

No. 429

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.
STATE BAR OF WISCONSIN,
an association,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATION TO OPINION BELOW

(May 1, 1962) 16 Wis. 2d 377, 114 N.W. 2d 796.

JURISDICTION

The judgment of the Wisconsin Supreme Court reversed the order of the trial court which dismissed the action on the defendant's motion for summary judgment and plaintiff's demurrer to the answer, upon the grounds that the trial court had no jurisdiction in unauthorized practice of law cases because exclusive jurisdiction of such matters is vested in the State Supreme Court.

In its opinion the Wisconsin Supreme Court held that the regulation of the practice of law is vested in the courts by the state constitution with the ultimate exercise of control being vested in the Supreme Court, legislative enactments to the contrary notwithstanding. It also held that foreign bodies cannot authorize unlicensed persons to practice law in Wisconsin and that the alleged lawfulness of engaging in activities amounting to the practice of law in other jurisdictions, such as in another state or before the I.C.C. cannot confer the right to so practice before state administrative agencies in Wisconsin.

CONSTITUTIONAL AND ADMINISTRATIVE REGULATIONS INVOLVED

ARTICLE I, SEC. 8, UNITED STATES CONSTITUTION,

reading in part:

"The Congress shall have power • • • to regulate commerce with foreign nations, and among the several states, • • •."

ARTICLE XIV, SEC. 1, AMENDMENTS TO THE UNITED STATES CONSTITUTION,

reading in part:

"• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws."

VOL. 5, WISCONSIN ADMINISTRATIVE CODE PUBLIC SERVICE COMMISSION RULES, CHAPTER PSC 2.80 (2),

reading:

"PSC 2.80 Applications for motor carrier authority and assignment thereof. * * *

"(2) Applications for authority or assignment of authority to engage in intrastate commerce by motor vehicle shall not be combined with applications for state authority or assignment thereof to engage in operations in interstate commerce requiring a certificate or permit under the Federal Motor Carrier Act of 1935 (Sections 194.03 (5) and 194.20, Wis. Stats.). In such cases separate applications must be filed and separate filing fees paid."

QUESTIONS PRESENTED

The respondent does not agree with the petitioner on the scope of the questions presented and as set forth by petitioner at pages 2 and 3 of his brief.

First Question

Petitioner states the first question as follows:

"I. Can a state, without violating Article I, Section 8, of the United States Constitution, limit or deny a federally licensed I.C.C. practitioner's right to engage in federally authorized I.C.C. activities within that state solely because such practitioner is not licensed by that state to practice law therein?"

Reference should be made at this point to the allegations of Paragraph VI of the amended complaint as set forth at pages 32a - 34a of petitioner's brief.

It will be noted that the petitioner was charged with two things, - first, as holding himself out to the public as being engaged in certain practices and secondly, as actually engaging in certain practices.

It was alleged that he held himself out as being engaged in the practice of making applications to the Wisconsin Public Service Commission (hereinafter referred to as P.S.C.) for authority to conduct trucking operations and to handle proceedings on behalf of truckers with respect to such applications and to appear before that agency and other administrative agencies in the state or elsewhere on behalf of members of the trucking industry to obtain permits of various kinds necessary to the operation of the trucking industry and to oppose, if desired, the granting of such permits to others.

This was in effect the holding out of the petitioner as being engaged in a broad spectrum of activities constituting in the aggregate the practice of law.

However, when it came to allegations relating to the actual activities of the petitioner the respondent carefully refrained from charging the petitioner with the performance of any activities outside the state or with practice before the Interstate Commerce Commission (hereinafter referred to as the I.C.C.) within the state or elsewhere.

The respondent merely alleged that the petitioner in the scope of his practice "appeared in a representative capacity on behalf of members of the trucking industry in proceedings and hearings before the Wisconsin Public Service Commission and that in the course of such representation he has examined and cross-examined witnesses and has taken such steps as he deems necessary to make a record upon which formal action by said commission adjudicating the rights of the parties may be predicated. Plaintiff alleges that in general defendant has at all times material hereto performed the services and engaged in the procedures and practices coming within the scope of Ch. PSC 2 of the administrative rules of said Public Service Commission as published in Vol. 5 of the Wisconsin Administrative Code and defendant claims the right to continue to do so unless lawfully restrained by a court of competent jurisdiction." (p. 33a - 34a petitioner's brief)

At no time in either the trial court or appellate court was it contended by respondent that the petitioner should be excluded from performing activities permitted under his I.C.C. license, nor has the record as yet gone back to the trial court for the entry of a specific injunction along the lines outlined by the Wisconsin Supreme Court in its opinion and as set forth in 16 Wis. 2d 377, 389-90 (petitioner's brief 16a).

Hence Question I as stated by the petitioner is not reached in this case, and the commerce clause of Article I, Section 8, United States Constitution, is not involved.

Questions II, III, and IV

In each of these questions as stated by petitioner reference is made to engaging "in state administrative agency transportation activities." To be accurate these words should read "in those state administrative agency transportation activities which the state supreme court defines as constituting the practice of law."

It was nowhere contended by respondent that every activity which takes place in a state administrative agency regulating transportation constitutes the practice of law, and this was made abundantly clear by the Wisconsin Supreme Court when it expressly said:

> "We do not consider that a layman is engaged in the practice of law when he investigates facts or procures evidence pertinent to his client's situation or to make reports thereon or testify thereto before a court or administrative tribunal, and he may hold himself out as available to do such things, but he may not advise his client or others concerning the rights or liabilities arising from his investigation." 16 Wis. 2d 377, 389 (Petitioner's brief 15a).

It is accordingly submitted that questions II, III, and IV should be modified as indicated above.

Question V

As stated by petitioner this question reads:

> "V. Can a state court, without violating equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution, permit one profession

to practice law without a license and yet prohibit another profession from practicing law because it does not have a license?"

This question is misleading as stated and to be accurate should read:

> "Can a state court, without violating equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution, permit non-lawyers to perform certain services which amount to the practice of law while prohibiting the performance of certain other services which also constitute the practice of law?"

By question V petitioner is seeking to point up what he believes to be an inconsistency between the Wisconsin Supreme Court's decision in *State ex rel. Reynolds v. Dinger* (1961) 14 Wis. 2d 193, 109 N.W. 2d 685, and the instant case.

In the *Dinger* case the court upheld a rule of the state real estate brokers' licensing agency. This rule authorized the drafting of certain conveyances by licensees even though the court considered this to constitute the practice of law. However, the court made it clear that the rule had no validity so far as it affected the practice of law but that the practice had long been permitted without objection by the courts or the bar and it had worked reasonably well. Nevertheless, the court emphasized that when, as, and if, it should ever consider the practice should be discontinued it would be time for the court to use its power regardless of the real estate broker licensing law or any rule adopted by the board.

It is too clear to call for any argument that the existence or absence of a licensing law had nothing to do either with the *Dinger* case or this case, since in both cases the court relied on the exclusive power of the courts to define and regulate the practice of law, legislative enactments to the contrary notwithstanding.

Hence, it is not proper to make the problem attempted to be stated in Question V dependent upon the presence or absence of a licensing law.

There is no objection to a question which goes into the power of a state supreme court under the 14th Amendment to permit laymen to perform certain acts which constitute the practice of law while denying them the right to perform other acts which also constitute the practice of law. However, as will be pointed out later, this question has already been met in the United States Supreme Court so that certiorari should not be granted in this case.

REASONS FOR DENYING THE WRIT

I. THE COMMERCE PROVISION OF ARTICLE I, SECTION 8, UNITED STATES CONSTITUTION IS NOT INVOLVED IN THIS CASE.

Petitioner devotes considerable space in his brief to the scope of his admission to practice before the I.C.C.

It is respectfully submitted that this has nothing to do with the case. As previously pointed out in discussing the "Questions Presented" in petitioner's brief there were no

allegations in the amended complaint relating to petitioner's practice before the I.C.C. The petitioner did not in his pleadings nor in his brief here disclose that he has ever appeared in an I.C.C. hearing in the State of Wisconsin or that any question of his right to so appear has ever been raised by the respondent.

What he is seeking to do is to convert his I.C.C. permit or license into an authorization to practice law before the Wisconsin P.S.C. on the basis of the argument that I.C.C. practice is incidentally involved in such practice.

As a matter of fact the two practices are entirely separate and distinct as is recognized by the Rule PSC 2.80 (2) of the P.S.C. which reads:

> "PSC 2.80 Applications for motor carrier authority and assignment thereof. * * *
>
> "(2) Applications for authority or assignment of authority to engage in intrastate commerce by motor vehicle shall not be combined with applications for state authority or assignment thereof to engage in operations in interstate commerce requiring a certificate or permit under the Federal Motor Carrier Act of 1935 (Sections 194.03 (5) and 194.20, Wis. Stats.). In such cases separate applications must be filed and separate filing fees paid."

The P.S.C. is not an arm or agency of the I.C.C. and the scope of the federal permit does not extend to practicing law before the P.S.C. or otherwise in the State of Wisconsin.

There are a number of cases very much in point.

One of these is *Chicago Bar Assoc. v. Kellogg* (1949) 338 Ill. App. 618, 88 N.E. 2d 519.

There the defendant was registered as a patent attorney with the United States Patent Office and maintained an office in Chicago. He was not licensed to practice law in Illinois. In the course of his activities and among other things he repeatedly construed patent licenses and gave opinions with respect to the infringement of patents. He also wrote letters charging a company with patent infringement.

Defendant made the contention that he has a constitutional right to perform and render all services pertaining to patents and trademarks which are incidental to the license issued to him by the U.S. Patent Office, a position comparable to that taken by the petitioner here in connection with his Interstate Commerce Commission lic nse.

The court took the view that the courts of the state of Illinois have the power to determine what contravenes its policy independent of any other authority saying at p. 523:

> "The fallacy of defendant's argument lies in the implication that the Patent Office had the right to permit the exercise of prerogatives which are forbidden under the laws of the State of Illinois as constituting unauthorized practice. No such authorization was issued by the United States Patent Office to defendant, nor was any power inherent in the Patent Office to permit defendant to practice law. * * *
>
> "* * * The Patent Office did not undertake to invest non-attorneys with the same rights, privileges, and duties as those had by attorneys at law in contravention

of the well defined rulings of the courts of Illinois. The police power and the procedure thereunder covering the enrollment and disbarment of lawyers and the punishment of unauthorized practitioners subject to its jurisdiction is a matter reserved for determination by the Judicial Department of the State of Illinois."

One of the provisions of the trial court's injunctional order was to restrain the defendant from "Participating as an attorney in legal proceedings other than United States Patent Office."

With respect to this the appellate court stated that while the defendant has the same right to appear as a witness in a legal proceeding as any other technical expert he nevertheless had no right whatsoever to participate as an attorney at law.

With reference to the fact that the defendant used forms provided for by the U.S. Patent Office for preparing certain papers, including the assignment of patents, licenses for royalty, etc., the court said that the use of such forms was not controlling upon the question of whether or not he was engaged in the practice of law.

The court made it clear that the defendant should not be enjoined as to matters coming before the U.S. Patent Office, but concluded that he should be enjoined from participating in 8 different types of activities, one of which is particularly pertinent here, as follows:

"4. Preparing, drafting and filing pleadings and other legal documents and papers in suits at law and in equity, in courts of record *and before administrative*

tribunals, other than the Patent Office." (p. 527.) (Emphasis supplied.)

By the same token in the instant case the fact that the petitioner is a registered Interstate Commerce Commission practitioner does not *authorize* him to prepare pleadings before the Public Service Commission of Wisconsin nor to participate as an attorney does in hearings before that agency. Whatever special talents and expertise he may have mastered in trucking operations can be fully utilized by calling him as an expert witness, but only a licensed attorney may make the record by examination and cross-examination of witnesses, making the proper objections and arguments on points of evidence and by making oral or written arguments before that agency.

Another case in point here is *Petition of Kearney* (Fla. 1953) 63 S. 2d 630.

There the petitioner was a resident of Florida, a member of the United States Supreme Court Bar, the Tax Court of the United States and was authorized to practice before the United States Treasury Department.

He wanted to practice in Florida limiting his appearance as "Federal Tax Counsel" to the Federal Courts and department named above. He petitioned the court to be advised whether or not such practice is within the jurisdiction of the State Courts or is within the exclusive jurisdiction of the Federal Courts and Commissioners before whom he proposed to practice. The court referred his petition to the Florida Bar Committee on Unauthorized

Practice and requested findings of fact and law including recommendations.

The committee found that the proposed practice was not governed exclusively by rules of the United States Courts and Departments but that the Florida Supreme Court had jurisdiction over the petitioner and that he was required to have a Florida license.

This was approved by the court which said at p. 630:

> "The American Bar Association is committed to like policy and holds, as do many states, that practice before the Tax Court and Treasury Department of the United States may constitute the practice of law which may be enjoined if attempted by one not admitted to practice. In the matter of New York County Lawyers Association (In re Bercu) 273 App. Div. 524, 78 N.Y.S. 2d 209, 9 A.L.R. 2d 787; Gardner v. Conway, 234 Minn. 468, 48 N.W. 2d 788; People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1; Stack v. P.G. Garage, Inc., 7 N.J. 118, 80 A. 2d 545."

The court accordingly concluded that petitioner must qualify to practice law in Florida if he would engage in the practice he contemplates.

The case of *In re Roel* (1957) 3 N.Y. 2d 224, 144 N.E. 2d 24; appeal dismissed 355 U.S. 604, is very similar and appropriate here.

The appellant in that case was a Mexican lawyer not admitted to practice in New York but advertised as a Mexican lawyer. At his office he advised members of the public on Mexican law, including Mexican divorce law,

acted as a consultant to members of the Mexican bar on legal matters, and testified as an expert witness on Mexican law in the New York Courts. He did not give any advice on New York law.

The court held that his activities constituted the practice of law, saying at p. 26:

"• • • We are here examining the nature of the activities performed by appellant, not the sources of authority of the law which he practices. Whether a person gives advice as to New York law, Federal law, the law of a sister state, or the law of a foreign country, he is giving legal advice."

The court went on to say at p. 28:

"In the present case we are dealing with the conduct of a person who renders legal services to the public as a business. While it is true that he renders only specialized services dealing with a field in which he claims to be peculiarly competent, the competence of appellant in the practice of his specialty is not dispositive of the case before us. In many fields of endeavor laymen acquire specialized knowledge which is relevant to the practice of law in that area. Thus accountants may know a great deal about tax law and labor relations consultants much about labor law. A specialized area of competence does not, however, entitle these laymen to engage in the business of giving legal advice based on their knowledge of the subjects. A foreign lawyer who is familiar with the law of the country in which he is a lawyer is in a similar position. He is a specialist in a particular field of the law, but is nevertheless a layman in this State when he is not a member of the Bar here."

The court pointed out that a New York lawyer could not in a disciplinary proceeding plead in defense that the matter involved related to New Jersey or Connecticut law which is a matter outside the jurisdiction of the New York court, and "• • • A foreign law specialist, • • • is not subject to discipline; he need not be a lawyer of any jurisdiction; he may be without good character; and his activities may not even be regulated under the present state of the law."

The latest case involving the principle that a federal permit or license confers no right to practice law other than before the federal agency involved is that of *State of Fla. ex rel. Fla. Bar v. Alexander T. Sperry* (Apr. 4, 1962, rehearing denied May 16, 1962) 140 S. 2d 587.

This case involved the activities of a person licensed to practice by the United States Patent Office. He held himself out to the public as a patent attorney although he was not licensed to practice law in Florida. He maintained an office in Tampa, rendered opinions on patentability and opinions as to whether or not patent rights are being infringed. He prepared various legal instruments, including contracts, applications and amendments to applications for patents and prepared briefs and authorities with points of law relating thereto.

With respect to the scope of the practice permitted by the defendant's admission to practice before the United States Patent Office the Florida Supreme Court had this to say: (pp. 594-5)

"While we agree that each of the federal courts and each of those federal agencies which are authorized by Congress to do so may determine who shall be permitted to practice before them, we do not agree that such authority in any way gives those bodies the authority also to determine that those licensed by it have the right to practice law, in the particular field involved, within the borders of this state.

"It may well be that this state may not prohibit any person from appearing and practicing law before a federal court or agency in this state, if he be licensed by the federal court or agency, even though such person not be a member of the Bar of this state. But appearing before such bodies is an entirely different thing from a person holding himself out in this state as qualified to practice law before such federal bodies, maintaining an office in this state for that practice, and doing in this state the many things that are necessary to be done preparatory to the actual appearance before such bodies.

"For example, if a United States Court of Appeals conducts sessions in this state attorneys from other states, not licensed to practice in this state, could not be prohibited from arguing before that court in this state, but they would not be permitted to establish an office and hold themselves out in this state as qualified to practice before the federal court unless they were first admitted to the Bar of this state. The Kearney case, 63 So. 2d 630, supra, settled this point directly.

"If we were to hold otherwise any person licensed to practice before the United States Supreme Court or any other federal court could establish an office and hold himself out in this state as being qualified to represent

Florida citizens before those courts without this state having any control over their right to so hold themselves out, or any control over their actions.

"As a further example, if the federal district courts in this state were to license non-lawyers to practice before them, these non-lawyers, under the rule contended for by respondent, would have the right to establish an office in this state and to hold themselves out to the citizens of this state as qualified to practice law before such courts and this state would be powerless to protect its citizens in the matter.

"Fortunately no such dispute has yet arisen between the states and the federal courts and it is hoped that it never will. Generally speaking the federal courts permit only duly admitted lawyers to practice before them and the matter of determining whether persons shall be admitted to the Bar has been left to the states. It appears that it is only in the federal quasi-judicial and administrative agencies, such as the Patent Office, that the non-lawyer is licensed to practice.

"As above stated, we have no argument with the power of such agencies to determine who shall practice before them, but we do not agree that their licensing of a non-lawyer is in anywise to be taken as proof that the work done before them is not the practice of law or that one licensed by them has the right by virtue of said license to hold himself out as qualified to do those things in this state."

II. THE FACT THAT THE PETITIONER MAY HAVE PRACTICED BEFORE THE P.S.C. FOR SEVERAL YEARS AND MAY BE QUALIFIED TO PERFORM THE ACTS HE HAS BEEN DOING CONFERS NO RIGHTS UPON HIM UNDER AMENDMENT XIV OF THE UNITED STATES CONSTITUTION.

Petitioner argues that he is in fact qualified to practice before the P.S.C. and has done so openly for many years which grants him vested rights that may not now be disturbed without violating vested property rights, citing *Dobbins v. Los Angeles* (1904) 195 U.S. 223 as controlling.

This is so unsound that it calls but for brief argument.

As was said by the Florida Supreme Court in *State v. Sperry*, supra, at p. 596:

> "[10] The right to practice law is not a privilege or immunity of a citizen of the United States within the meaning of the Fourteenth Amendment to the Constitution of the United States. West Virginia State Bar v. Earley, 109 S.E. 2d 420, supra, Ginsburg v. Kovrak, 1958, 392 Pa. 143, 139 A. 2d 889, appeal dismissed 358 U.S. 52, 79 S. Ct. 95, 3 L.Ed. 2d 46. See also Petition of Florida State Bar Association, 186 So. 280, supra."

The effect of a long standing custom of practice of law by laymen was effectively laid at rest by the Arizona Supreme Court in the case of *State Bar of Ariz. et al. v. Ariz. Land Title and Trust Co. et al.* (Nov. 1, 1961) 366 P. 2d 1. Among other things this case involved the practice of law by real estate brokers in the drafting of various types of legal documents.

The Arizona court had this to say about the so-called prescriptive right to practice law arising out of long continued custom:

> "This is tantamount to saying 'We have been driving through red lights for so many years without a serious mishap that it is now lawful to do so.' The fact that these practices have continued for many years and have been acquiesced in by the bar does not make such activities any less the practice of law. It seems fair to assume that the public is relatively unaware of the evils inherent in this situation, or at least ignorant of the fact that they are not adequately represented in the average land transaction. It is apparent that the bar has been remiss in allowing the present custom to develop unabated. It is true that the record does not disclose any testimony regarding specific injury to the public from appellees' practices. However, in the sphere which encompasses the regulation of the practice of law, it is not merely this Court's function to redress past injury but to prevent harm in the future as well. Thus, neither the public's blissful acquiescence nor the bar's confessed lethargy can clothe the activities with validity. There is no prescriptive right to practice law and appellees have acted 'at their peril' since the time when the practices condemned here were initiated. Keyes Co. v. Dade County Bar Ass'n, S.C. Fla., So. 2d 605 (1950); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935). • • •" (p. 13).

If technical competence alone were the test many a disbarred attorney and many a top-flight surgeon whose licenses were revoked for reasons having no relationship to professional skills, would still be in practice and could not be deprived of "vested" rights.

III. PETITIONER'S PRACTICE BEFORE P.S.C. DOES CONSTITUTE THE PRACTICE OF LAW AND AS SUCH IS SUBJECT TO THE INHERENT CONTROL OF THE WISCONSIN SUPREME COURT.

Petitioner contends that practice before a state administrative agency does not constitute the practice of law.

This contention, of course, constituted the gist of the lawsuit on the merits, and respondent will do no more here than to cite the authorities which were successfully relied upon in the Wisconsin Supreme Court as establishing the proposition that such practice is the practice of law.

Clark v. Austin (1937) 340 Mo. 467, 101 S.W. 2d 977. (Practice as in instant case before state P.S.C.)

State ex rel. Johnson v. Childe (1946) 147 Neb. 527, 23 N.W. 2d 720. (Same type of practice)

Blair et al. v. Motor Carriers Service Bureau, Inc. (1939) 40 Pa. Dist. and County Reports 413. (Same type of practice)

People ex rel. Chicago Bar Assoc. v. Goodman (1937) 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1, certiorari denied by United States Supreme Court, 302 U.S. 728. (Practice before state industrial commission)

Chicago Bar Ass'n v. United Tax Payers of America (1942) 312 Ill. App. 243, 38 N.E. 2d 349. (Tax refunds before department of finance)

In re Unauthorized Practice of Law in Lucas County (1955) Ohio Court of Common Pleas, 160 N.E. 2d 423. (Unemployment Compensation practice)

Goodman v. Beall (1936) 130 Ohio St. 427, 200 N.E. 470. (Industrial Commission practice)

McMillen v. McCahun (1960) Sauk County Ohio Court of Common Pleas, 167 N.E. 2d 541. (Industrial Commission practice)

State ex rel. Daniel v. Wells (1939) 191 S.C. 468, 5 S.E. 2d 181. (Industrial Commission practice)

West Va. State Bar v. Earley (1959 W. Va.) 109 S.E. 2d 420. (Industrial Commission practice)

Stack v. P.G. Garage, Inc. (1951) 7 N.J. 118, 80 A. 2d 545. (Reduction of taxes before county tax board)

Fred J. Hofmeister, et al. v. Edward M. Tod (1961 Mo.) 349 S.W. 2d 5. (Practice before Workmen's Compensation Commission)

In every one of these cases it was made clear that appearing for others in a representative capacity before state administrative agencies constitutes the practice of law.

IV. THE STATE SUPREME COURT HAS THE INHERENT POWER TO DEFINE AND REGULATE THE PRACTICE OF LAW AND THE FACT THAT IT PERMITS LAYMEN TO PERFORM CERTAIN ACTS WHICH TECHNICALLY CONSTITUTE THE PRACTICE OF LAW DOES NOT DENY EQUAL PROTECTION OF THE LAWS TO PERSONS WHO ARE NOT PERMITED TO PERFORM CERTAIN OTHER ACTS CONSTITUTING THE PRACTICE OF LAW.

Petitioner contends that he is being denied the equal protection of the laws because the Wisconsin Supreme

Court in *State ex rel. Reynolds v. Dinger* (1961) 14 Wis. 2d 193, 109 N.W. 2d 685, saw fit not to interfere with the drafting of certain conveyances by real estate brokers although conceding that this constitutes the practice of law.

If the Wisconsin Supreme Court had seen fit to permit some real estate brokers to engage in this practice while denying the privilege to others or if it saw fit to permit some laymen to practice before the P.S.C. and not others such as the petitioner, there might be some merit to petitioner's contention.

However, there has been no such discrimination. Each member of each group is accorded equal treatment.

It should also be noted that in the case of the real estate brokers the drafting of legal instruments was but an incident to the lawful business of selling real estate, whereas in the case of the petitioner the principal business is that of appearing for others in a representative capacity before a tribunal empowered to adjudicate valuable rights and before whom the record for purposes of court review is made.

While some state supreme courts have gone so far as to close both the field of conveyancing and the field of practice before state administrative agencies from lay practice, the Wisconsin Supreme Court has not seen fit thus far to do so. If all lay practice be viewed as an evil, no constitutional rights are impaired merely because the courts have not seen fit to correct all of the evil so long as there is no discrimination between members of the same class.

It is well recognized that a state may, without denial of equal protection of the laws, classify business and occupations for purposes of regulation, provide different rules for different classes, limit a regulation to a particular kind of business, extend to some persons privileges denied to others, or impose restrictions on some but not on others, where the classification or discrimination is based on real differences in the subject matter, and where the classification or the discrimination is reasonable and affects alike all persons pursuing the same business under the same conditions. See 16A C.J.S. Const. Law §510, pp. 338-339.

Petitioner has pointed to no authority to the effect that real estate brokers and lay practitioners before administrative tribunals must receive equal treatment so far as classification and regulation are concerned.

By the great and overwhelming weight of authority the judicial department is the sole arbiter of what constitutes the practice of law and it has the inherent power to control and prevent the unauthorized practice of law.

Fitchette v. Taylor (1934) 191 Minn. 582, 254 N.W. 910.

People ex rel. Chicago Bar Assoc. v. Goodman (1937) 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1, certiorari denied by United States Supreme Court, 302 U.S. 728.

Arkansas Bar Ass'n v. Union Nat'l Bank (1954) 224 Ark. 48, 273 S.W. 2d 408.

State Bar Ass'n v. Connecticut Bank & Trust Co. (Conn. 1958) 140 A. 2d 863.

People ex rel. Illinois State Bar Ass'n v. Peoples Stock Yards State Bank (1931) 344 Ill. 462, 176 N.E. 901.

Bump v. District Court (1942) 232 Iowa 623, 5 N.W. 2d 914.

Opinion of the Justices (1935) 289 Mass. 607, 194 N.E. 313.

Opinion of the Justices (1932) 279 Mass. 607, 180 N.E. 725.

Curry v. Dahlberg (1937) 341 Mo. 897, 110 S.W. 2d 742.

Gardner v. Conway (1951) 234 Minn. 468, 48 N.W. 2d 788.

In re Baker (1951) 8 N.J. 321, 85 A. 2d 505.

New Jersey State Bar Ass'n v. Northern N.J. Mtg. Asso. (1956) 22 N.J. 184, 123 A. 2d 498.

Land Title Abstract & Trust Co. v. Dworken (1934) 129 Ohio St. 23, 193 N.E. 650.

Rhode Island Bar Ass'n v. Automobile Service Ass'n (1935) 55 R.I. 122, 179 Atl. 139.

In re Morse (1924) 98 Vt. 85, 126 Atl. 550.

Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n (1937) 167 Va. 327, 189 S.E. 153.

Washington State Bar Ass'n v. Washington Ass'n of Realtors (1952) 41 Wash. 2d 697, 251 P. 2d 619.

Hulse v. Criger (1952) 363 Mo. 26, 247 S.W. 2d 855.

Lowell Bar Ass'n v. Loeb (1943) 315 Mass. 176, 52 N.E. 2d 27.

Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n (1957) 135 Colo. 398, 312 P. 2d 998.

Clark v. Austin (1937) 340 Mo. 467, 101 S.W. 2d 977.

State ex rel. Hunter v. Kirk (1937) 133 Neb. 625, 276 N.W. 380.

Judd v. City Trust & Savings Bank (1937) 133 Ohio St. 81, 12 N.E. 2d 288.

Lathrop v. Donohue (1960) 10 Wis. 2d 230, 102 N.W. 2d 404, 367 U.S. 820.

State ex rel. Reynolds v. Dinger (1961) 14 Wis. 2d 193, 109 N.W. 2d 685.

State ex rel. State Bar v. Keller (1962) 16 Wis. 2d 377, 114 N.W. 2d 796.

CONCLUSION

The basic issue in the lawsuit was whether a layman may solicit and render the service of representing others before a state administrative agency, file pleadings and briefs, examine and cross-examine witnesses, furnish legal advice and hold himself out as being qualified to do so.

The attempt to drag in his I.C.C. license can be viewed only as an effort to muddy the waters and inject a federal issue where none really exists.

So far the United States Supreme Court has rejected all petitions for writs of certiorari in cases involving unauthorized practice of law.

People ex rel. Chicago Bar Assoc. v. Goodman (1937) 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1, certiorari denied 302 U.S. 728.

Arkansas Bar Assoc. et al. v. Block et al. (Ark. 1959) 323 S.W. 2d 912, certiorari denied 361 U.S. 836.

Also in the case of *Roel v. New York County Lawyers Assoc.* (1957) 3 N.Y. 2d 224, 144 N.E. 2d 24, the bar association's motion to dismiss the appeal was granted and the appeal was dismissed for want of a substantial federal question, 355 U.S. 604.

Such disposition of petitions for writ of certiorari and attempted appeals are, of course, in line with the generally held view that a state acting under its police power has the right to define the practice of law and to determine who is qualified to practice within its borders.

See:

State v. Sperry (1962 Fla.) 140 S. 2d 587, 595.

Chicago Bar Assoc. v. Kellogg (1949) 338 Ill. App. 618, 88 N.E. 2d 519.

Petition of Florida Bar Assoc. (1938) 134 Fla. 851, 186 S. 280, 285.

Clark v. Austin (1937) 340 Mo. 467, 101 S.W. 2d 977.

Richmond Assoc. of Credit Men, Inc. v. Bar Assoc. of City of Richmond (1937) 167 Va. 327, 189 S.E. 153.

Lathrop v. Donohue (1960) 10 Wis. 2d 230, 102 N.W. 2d 404, 367 U.S. 820.

The petition for a writ of certiorari herein should be denied.

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